



Council Tree Communications Inc.

Colorado Office

2919 17th Avenue, Suite 205
Longmont, Colorado 80503
Phone: (303) 678-1844
Fax: (303) 678-1859
www.counciltree.com

New York Office

The Chrysler Building
405 Lexington Avenue, 25th Floor
New York, New York 10174
Phone: (212) 286-8700
Fax: (917) 591-4507

March 20, 2006

BY ELECTRONIC FILING

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Room TW-B204
Washington, DC 20554

Re: Written Ex Parte Presentation
WT Docket No. 05-211

Dear Ms. Dortch:

On behalf of Council Tree Communications, Inc. ("Council Tree"), I am writing in response to the Ex Parte Submission of the Department of Justice ("DOJ") filed in the referenced proceeding on March 17, 2006.

Council Tree agrees with the DOJ insofar as it supports the Commission's proposal to deny designated entity ("DE") benefits to entities that have a material relationship with a large in-region incumbent wireless service provider. See DOJ Ex Parte Submission at 1. The record in this proceeding and common sense strongly support the Commission's core proposal.

In contrast, the record in this proceeding does not support the idea offered at the very end of the DOJ filing to extend the Commission's limitation to DE relationships involving "any affiliate to a DE . . . whether the affiliate is a large in-region wireless provider, an out-of-region wireless provider . . . or entities with significant interests in communications services." *Id.* at 6. Extending the Commission's limitation in such a dramatic way would have at least five fatal defects:

1. Such an extension of the Commission's limitation would run counter to the Commission's longstanding conclusion that DEs must have access to sources of capital and industry and technical experience. The Commission's new limitation should prevent DEs from helping to extend the influence of already-dominant national wireless service providers. It should *not* operate to foreclose opportunities for DEs where national wireless service providers are not involved. Foreclosure of such opportunities would mean that DEs could never realistically compete against

national wireless service providers, which would have the bizarre effect of furthering the already profound concentration of industry ownership and control.

2. DOJ's experience in this area squarely corroborates the Commission's tentative conclusion to apply its limitation only to relationships involving the largest national wireless service providers. The substance of DOJ's filing appears to be based on its experience in reviewing DE relationships in connection with huge industry mergers of recent years. Standing uncontested in the extensive record in this proceeding is the fact that handful of large national wireless carriers now collectively, have 90 percent of industry subscribers, 91 percent of industry spectrum (MHz-POPs), and 92 percent of industry revenue. The circumstances of the rest of the industry participants (*i.e.*, the remaining carriers that have 10 percent of subscribers, 9 percent of industry spectrum (MHz-POPs) and 8 percent of industry revenue) and prospective DEs are entirely different. If the Commission truly wishes to promote more competition in the wireless industry, it should not burden this struggling segment with limitations that are supported neither by the record nor by competitive circumstances.
3. Extending the scope of the Commission's tentative conclusion (e.g. to "any affiliate" or "any" wireless providers or "entities with significant interests in communications services") would put the Commission on the slippery slope of complex analysis and difficult administration that is far beyond the scope of this proceeding. Is a small rural wireless provider that is struggling to provide service in its area to be included in the scope of the new limitation? Is a regional wireless carrier struggling to compete with vastly larger wireless carriers with national footprints to be included? Is an Internet service provider to be included? Is an electric utility providing broadband over power line to be included? Is a content provider to be included? Is a software company or equipment vendor to be included? If so, why? If not, why not? Should an equipment manufacturer be prohibited from providing vendor financing to a DE licensee? The Commission got it right in its *Further Notice of Proposed Rulemaking*. The only clear problem to be addressed in this proceeding relates to the five national wireless providers that already control now collectively, 90 percent of industry subscribers, 91 percent of industry spectrum (MHz-POPs), and 92 percent of industry revenue. The only defensible line that may be drawn under these circumstances is one that is tailored to that problem.
4. The Commission — not DOJ — is required to balance a number of interests in administering a program of competitive bidding under Section 309(j).¹ Among these are the directives to promote "economic opportunity and competition . . . by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants . . ." and to "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services . . ." It is the duty of the Commission to administer the preferences it offers in the service of

¹ DOJ's ultimate prescription (*i.e.*, for closer scrutiny of DE-related transactions) is, of course, already within the Commission's control and expertise.

these and other objectives in a manner that is faithful to the statute and realistic in practice. In doing so, the Commission must fashion balanced, workable regulations and the Commission must proceed to auction licenses without undue delay. Endorsement of DOJ's concluding proposal would be inconsistent with these Commission duties.

5. Finally, to extend the Commission's tentative conclusion to other wireless providers or to entities with significant interests in communications services would be to venture far outside what the record in this proceeding can sustain. The record does support the limitation regarding the national wireless service providers. It does not support a limitation regarding other parties. To go beyond this fair, open, and clear record would significantly tax the Commission's resources and would invite many parties to contest the Commission's ultimate ruling, both of which inevitably would disrupt the timing and certainty of Auction 66.² Litigation-related delay of this important auction will serve no party well, and the Commission should undertake to avoid it by crafting defensible regulations that are tailored to the actual problem shown in the record of this case.

In conclusion, the thrust of DOJ's comments supports the Commission's tentative conclusion, but the Commission should not endorse the idea offered at the very end of the DOJ filing to extend the Commission's limitation to DE relationships involving "any affiliate to a DE . . . whether the affiliate is a large in-region wireless provider, an out-of-region wireless provider . . . or entities with significant interests in communications services."

One copy of this written presentation is being submitted electronically pursuant to Section 1.1206(b)(1) of the Commission's Rules. One copy is also being forwarded to each of the Commissioners, as well as Fred Campbell, John Giusti, Aaron Goldberger, and Barry Ohlson.

Sincerely,

/s/ George T. Laub

George T. Laub

cc: The Honorable Kevin J. Martin
The Honorable Michael J. Copps
The Honorable Jonathan S. Adelstein
The Honorable Deborah Taylor Tate
Fred Campbell
John Giusti
Aaron Goldberger
Barry Ohlson

² Many commentators expressed that the single most important aspect of this proceeding is that it not disrupt the timing or certainty of the auction.